

Lawrence S. Jezouit,
309 Freeman Street
Hartford, CT 06106-4222
Phone: (860) 953-3909,
E-mail: ljez@comcast.net
May 3, 2013

Received & Inspected
MAY 08 2013
FCC Mail Room

Submitted pursuant to: Proceeding Number: 13-36

FCC 13-17

Released: February 5, 2013

**COMMISSION SEEKS PUBLIC COMMENT IN
2012 BIENNIAL REVIEW OF TELECOMMUNICATIONS REGULATIONS**

**RULE PARTS CONTAINING REGULATIONS ADMINISTERED BY THE
CONSUMER & GOVERNMENTAL AFFAIRS BUREAU (CGB)
CG Docket No. 13-29**

Part 64 – Miscellaneous Rules Relating to Common Carriers – Addresses a broad range of common carrier issues. Specifically:

Subpart E—Use of Recording Devices by Telephone Companies

§ 64.501 Recording of telephone conversations with telephone companies.

The language of the existing 47 CFR 64.501 operates in a manner that results in an absurd and unworkable outcome.

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As written, 47 CFR 64.501's prefatory clause in conjunction with § (a)'s **verbal consent** and § (b)'s **verbal notification** require that **verbal consent** – as amended by FCC Order as set out below – and **verbal notification be recorded as part of and at the beginning of the recording.**

The tailored prefatory clause below when read together with § (a)'s and § (b)'s words **"Where such use shall be preceded"** makes compliance impossible because the language prohibits the use of "any recording device ... except ... where such use is preceded by verbal consent or verbal notification, which is recorded at the beginning, and as part of the call." 47CFR64.501's language is parsed below: [Emphasis added.]

Subpart E—Use of Recording
Devices by Telephone Companies
§ 64.501 Recording of telephone conversations
with telephone companies.

**No telephone common carrier, ..., may
use any recording device ...,
except under the following conditions:**

**(a) Where such use shall be preceded
by verbal ... consent**

[By FCC **ORDERS**, the verbal consent **"must be recorded."** See next.]

*FCC 81-217 In the Matter of
Use of Recording Devices in Connection with Telephone Service, 86 FCC
2d 313, 322 (1981)*

VI. Summary and Conclusions

23. As discussed above, after carefully considering the comments submitted in response to our *Notice of Proposed*

Rulemaking, Docket 20840, 67 FCC 2d 1392 (1976), we have decided not to adopt a rule in this area. **We have further decided to revise our present beep tone requirement to include, as an alternative, the all-party consent requirement.** Additionally, we are rescinding our proscription on the use of acoustic and inductive recording devices and are continuing our exclusion of private line services, except where such services access the public switched network. [Emphasis added.]

24. As a result of this proceeding, Section 64.501 of our Rules, 47 C.F.R. §64.501, dealing with the use of recording devices by telephone companies, will be revised to comport with our findings. The revisions to Section 64.501 are set out in Appendix C and are to become effective on May 18, 1981. [Emphasis added.]

Appendix C

1. Part 64 - Miscellaneous Rules Relating to Common Carriers - Subpart E - Use of Recording Devices by Telephone Companies - is amended as follows:

§64.501 is amended by revising paragraphs (a) and (b) and by adding a new (b)(1) to read as follows:

§64.501 Recording of telephone conversations with telephone companies.

* * *

(a) Where such use shall be preceded by verbal or written consent of all parties to the telephone conversation, or,

(b) Where such use shall be accompanied by an automatic tone warning device, which will automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use. Provided that:

(Note: At this point, the language **does not** require that the **verbal consent** be recorded but see next **ORDER**.)

FCC 83-479 In the Matter of
Use of Recording Devices in Connection with Telephone Service, 95 FCC
2d 848, 849, 850, 851 (1983)

I. INTRODUCTION

1. **Before the Commission are three petitions for clarification or reconsideration of portions of our Memorandum Opinion and Order in this proceeding, 86 FCC 2d 313 (1981) (Order), ... In that decision, inter alia, we modified our policies concerning the use of recording devices in connection with telephone service to allow mutual consent to record as an alternative to the beep tone requirement [Emphasis added.]**

2. The petitions for clarification or reconsideration do not question our decision to allow mutual consent as an alternative to the beep tone ... In addition, **AT&T asks us to (1) declare that consent must be given prior to recording; (2) prescribe the method for obtaining oral consent; [Emphasis added.]**

...

4. In the meantime, however, leaving open the possibility that the comments persuade us

that it is in the public interest to retain some restrictions, we resolve below the other issues raised in the petitions for clarification or reconsideration.

II. PETITIONS FOR CLARIFICATION OR RECONSIDERATION

A. Consent to Record

5. In its petition for clarification, AT&T poses three requests concerning consent. First, under the supposition that our Order is unclear on the requirement that consent be obtained prior to recording, it asks that we amend the ordering clauses to specify prior consent. Second, noting that our order does not mandate the manner in which verbal consent is to be obtained, it asks that we require such consent to be recorded. Lastly, AT&T asks that we place the burden of proof on the recording party to demonstrate that consent to record has been properly obtained. ...
[Emphasis added.]

7. After carefully considering the above arguments, we will grant AT&T's request in part. We clearly intended that consent to record be obtained prior to recording a conversation. We will therefore clarify paragraph 23 of the Order to specify that the "all party consent requirement" is satisfied only if the consent is obtained prior to recording the conversation. ...
[Emphasis added.]

III. CONCLUSIONS AND ORDERING CLAUSES

12. ... **Additionally, we have clarified that the consent to record must be obtained prior to the recording; that the consent, if ... verbal, must be recorded; ...** [Emphasis added.]

(Note: At this point, the language **does require** that the **verbal consent** be recorded by **ORDER** but also note that the FCC **did not** amend the language of 47CFR64.501, which will be "corrected" below.)

The text of 47 CFR 64.501 resumes at § (b) **AND** with the prefatory clause repeated: [Emphasis added.]

Subpart E—Use of Recording
Devices by Telephone Companies
§ 64.501 Recording of telephone conversations
with telephone companies.

**No telephone common carrier, ..., may
use any recording device ...,
except under the following conditions:**

...
**(b) Where such use shall be preceded
by verbal notification[sic] which is recorded
at the beginning, and as part of the call ...**

To repeat, the language of 47 CFR 64.501's prefatory clause when read together with § (a)'s language for **verbal consent**, as amended by ORDER and § (b)'s language for **verbal notification, which is recorded at the beginning, and as part of the call** are **absurd and unworkable.**

Consider modifying the “faulty” and unworkable language of 47 CFR 64.501 as set out below:

[Copied from FDsys at the following URL: <http://www.gpo.gov/fdsys/pkg/CFR-2010-title47-vol3/pdf/CFR-2010-title47-vol3-sec64-501.pdf>]

**Subpart E—Use of Recording
Devices by Telephone Companies**

§ 64.501 Recording of telephone conversations with telephone companies.

No telephone common carrier, subject in whole or in part to the Communications Act of 1934, as amended, may use any recording device in connection with any interstate or foreign telephone conversation between any member of the public, on the one hand, and any officer, agent or other person acting for or employed by any such telephone common carrier, on the other hand, except under the following conditions:

(1) Replace the existing § (a)'s language with:

(a) Where consent is obtained from every other party and such consent is (1) documented beforehand or (2) recorded at the beginning and as part of the recording, (3) In both cases, such consent is deemed to be reciprocal, or

(2) Replace the existing § (b)'s language with:

(b) Where the recording contains a verbal notification that must be made in a clear, unambiguous manner at the beginning and, as part of, the recorded portion of the call.

The following FCC ORDER implemented the verbal notification option.

*FCC 86-570 In the Matter of
Use of Recording Devices in Connection with Telephone Service, 2 FCC
Rcd 502, 504, 506 (1986)*

21. As noted, however, **we are adding a one-party notification option to the present beep tone and mutual consent options.** The purpose of Commission regulation in this area is to **assure notification** to the parties that their conversations are being recorded. **Notification at the beginning of the call** will meet that objective as well as beep tone or mutual consent.²⁴ **Notification must be made in a clear, unambiguous manner at the beginning and as part of, the recorded portion of any call.** We further believe that one-party notification will be less intrusive and cumbersome in some situations than the mutual consent option and could, therefore, reduce any burdens which the present requirements might be causing. [Emphasis added.]

...

²⁴ It is, of course, obvious that any party not wishing to be recorded can, upon so being notified, prevent that recording by merely terminating the call.

26. As a result of this proceeding and pursuant to the authority granted in Sections 4(i), 40), 201, and 218 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201 and 218, **Section 64.501 of our Rules, 47 C.F.R. § 64.501, dealing with the use of recording devices by telephone companies will be revised to comport with our findings. The revisions to Section 64.501 are set out in Appendix B and are to become effective March 12, 1987. [Emphasis added.]**

...

APPENDIX B

Part 64 of the Commission's Rules is amended as follows:

Part 64 - Miscellaneous Rules Relating to Common Carriers

1. The authority citation for Part 64 continues to read as follows:

Authority: 47 U.S.C. 154, unless otherwise noted.

2. § 64.501 is amended by redesignating existing paragraphs (b), (c) and (d) as paragraphs (c), (d) and (e), respectively and adding a new paragraph (b) to read as follows:

§ 64.501 Recording of telephone conversations with telephone companies.

* * * *

(b) Where such use shall be preceded by verbal notification which is recorded at the beginning, and as part of the call, by the recording party, or,

* * * *

Note that it was specifically stated by the FCC that the verbal notification “must be made in a clear, unambiguous manner at the beginning and as part of, the recorded portion of any call.”

Any verbal notification such as “This call may be monitored or recorded” would clearly NOT meet the clear, unambiguous requirement.